Petition

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No. 81-1184

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN ASHCROFT
Attorney General of Missouri,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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December, 1981

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I

QUESTION PRESENTED FOR REVIEW

Whether or not the denial of a motion to dismiss filed pursuant to Rule 12(b)(6), F.R.Civ.P., raising the defense of absolute quasi-judicial immunity from suit on behalf of the Attorney General of Missouri who is being sued for damages because of his initiation and maintenance of an antitrust action against the plaintiff below, is final for purposes of appeal pursuant to 28 U.S.C. § 1291.

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No. _____

IN THE

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OCTOBER TERM, 1981

JOHN ASHCROFT
Attorney General of Missouri,
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPORTS OF DECISION

The decisions below are unreported. They are contained in Appendix A of this petition.

JURISDICTION OF THIS COURT

Petitioner seeks review of a judgment issued by the United States Court of Appeals for the Eighth Circuit dismissing the appeal filed by petitioner. The dismissal order was entered October 13, 1981. Respondent seeks the writ of certiorari pursuant to 28 U.S.C. § 2154(1).

STATUTES INVOLVED

28 U.S.C., § 1291 provides as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

The petitioner for writ of certiorari seeks review of an order from the United States Court of Appeals for the Eighth Circuit dismissing as unappealable a district court order denying petitioner's Motion to Dismiss Filed pursuant to Rule 12(b)(6), F.R.Civ.P.

On May 7, 1981, the National Organization for Women, Inc., (hereafter referred to as NOW), filed a complaint under 42 U.S.C., §§ 1983 and 1985 alleging that its civil rights under the First and Fourteenth Amendments had been violated by the Attorney General of Missouri and requesting $2.5 million compensatory damages and $7.5 million punitive damages against the Attorney General in both his official and individual capacities. The complainant claimed that the Attorney General filed an unsuccessful anti-trust action in the United States District Court for the Western District of Missouri in order to enjoin NOW's activities in connection with a convention boycott of Missouri. The complaint alleges that the bringing of the antitrust action was tortious because (1) the Attorney General intended that the suit would injure NOW's ability to pursue its campaign to have the Equal Rights Amendment ratified and (2) his suit was intended

to promote the Attorney General's personal political career. (Paragraphs 20 and 25, inclusive, of the complaint which is contained in Appendix B.)

In the previously filed antitrust action, the district court found that NOW had conspired with others in a combination in restraint of trade as those terms are used in the Sherman Antitrust Act. 15 U.S.C. § 1. The court also found that sufficient economic damage had been done by the boycott to Missouri's hotel and convention business and to the state economy to give the state *parens patriae* standing to seek injunctive relief pursuant to the antitrust laws. *Missouri* v. *NOW*, 467 F.Supp., 289, 296, 300-301 (W.D. Mo. 1979), *affir'd* 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980). Nevertheless, the court denied injunctive relief because it held the Sherman Act was not intended to cover boycotts that did not have an anti-competitive purpose. *Id.* at 304. It also noted that there would be substantial First Amendment problems in regard to the right to petition and freedom of association if boycott activity which had as its object a political result could be enjoined under the antitrust laws. *Id.* at 304-305. The court refused relief under federal and state anti-trust laws and under the claim that NOW had committed the tort of intentionally inflicting an economic harm upon the State without legal justification or excuse. The anti-trust action had sought a permanent injunction as its sole request for relief.

The complaint filed by NOW in the court below alleging civil rights violations by the Attorney General is premised on his acts in initiating and maintaining the lawsuit. See paragraphs 20-25, inclusive of the complaint. In response, the Attorney General, filed a motion to consolidate with the antitrust case, which case is still open in regard to NOW's claim for attorneys fees under the bad faith exception to the American rule. Accompanying that

was a motion for more definite statement. Both were summarily denied. The Attorney General then filed a motion to dismiss pursuant to Rule 12(b)(6) presenting two defenses protecting the Attorney General from having to litigate the lawsuit. One was the Eleventh Amendment defense to his being liable for damages in his official capacity and the other was his absolute quasi-judicial immunity against being sued for damages in his individual capacity for acts taken in regard to his enforcing antitrust laws through judicial proceedings. After suggestions in opposition were filed by NOW, the motion was summarily overruled without opinion. No request to have the question of immunity certified under 28 U.S.C. § 1292 was made. Instead, the Attorney General filed his notice of appeal pursuant to 28 U.S.C. § 1291. NOW filed a motion to dismiss on the basis of lack of finality, with a request for attorneys fees and double costs. After suggestions in opposition were filed by the Attorney General, the request for attorneys fees and double costs was denied but the motion to dismiss was granted.

Basis for the jurisdiction of the United States District Court was 28 U.S.C., §§ 1331, 1332 and 1343.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the Court of Appeals' decision denying finality for purposes of appeal under 28 U.S.C. § 1291 of the order denying the motion to dismiss places it in conflict with two other circuits. Furthermore, the issue is of great importance to governmental officials who depend upon their immunity from suit to save them from expending their time and resources in defending actions brought against them for acts taken in their official capacity which are covered by the theory of quasi-judicial immunity.

The issue in regard to the appealability of the order denying the motion to dismiss has come to be called the "collateral order rule." In certain circumstances, it is permitted under 28 U.S.C. § 1291, that orders may be appealed other than those which finally terminate the entire litigation. There is a distinction between a final decision under 28 U.S.C. § 1291 and a final judgment. The final judgment is always a final decision, but a final decision is not necessarily a final judgment. *Abney* v. *United States,* 431 U.S. 651, 658, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In *Coopers* and *Lybrand* v. *Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), this Court summarized the requirements of the collateral order doctrine as follows: The district court's order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Id.* at 468-469. Petitioner contended in the Court of Appeals that the order denying the motion to dismiss based on Attorney General's absolute immunity from suit clearly met these criteria. First, the order fully disposed of the Attorney General's claims of immunity and the Eleventh Amendment. The order denying the motion to dismiss leaves nothing open, unfinished or inconclusive. These immunities which are calculated to protect a defendant, not so much from damages, as from the time and expense of defending the lawsuit, are now completely lost to the defendant unless he can have a Court of Appeals determination of the correctness of the lower court's ruling. Second, the issues resolved by the denial of the motion were completely collateral to the merits of the action and did not depend upon the ability or inability of plaintiff to prove the factual allegations of its complaint. Third, the decision involved implicated an im-

portant right which would be irreparably lost if review had to await the appeal from the final judgment. A claim of immunity protects the very inquiry that discovery and a trial would entail. The most important aspect of the claim of immunity would, therefore, be lost if the defendant is indeed forced to proceed to trial.

The Court of Appeals held that the order denying the motion to dismiss was not final pursuant to 28 U.S.C., § 1291. In doing so it put itself directly contrary to two other circuits. In *McSurely* v. *McClellan,* 521 F.2d 1024 (D.C.Cir. 1975). The district court had denied the defendants' motion to dismiss or for summary judgment based upon the Speech and Debate Clause of the Constitution. The Court of Appeals concluded that this order was appealable under the *Cohen* rule. In so holding the Court stated:

> "The defendants assert that their actions in this case are completely insulated from judicial inquiry by the Speech or Debate clause. That claim is clearly not frivolous. If they are required to respond to interrogatories, answer questions put in depositions, and defend themselves in a plenary trial covering the whole of their activities, they will have been forced to surrender their claimed privilege regardless of their validity. An appeal from the final judgment in the action will come too late to give meaningful review of their claim. We hold, therefore, that as to the defendants' assertion of immunity from inquiry, the District Court's denying summary judgment was a 'final decision' under 28 U.S.C. § 1291." *Id.* at 1032.

Because legislative immunity is an absolute defense from judicial inquiry, the same as is prosecutorial immunity and because the two immunities serve the same purposes protecting the officials from discovery and trial, the case is

analogous to the instant one. See *Butz* v. *Economou*, 438 U.S. 478, 506, 515-517 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409, 423-424 and n. 20; concurring opinion at 438 n. 4 (White, J.) (1976).

In *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979), the Court held that a pre-trial order rejecting the claim of absolute immunity by the Attorney General of the United States was appealable under the *Cohen* doctrine.

> "Appellate review at this time will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits." *Id.* at 1208-1209. *Accord, Dellums* v. *Powell*, 80 [illegible]1 (D.C.Cir. July 24, 1981) at p. 4 and n. 5 of slip opinion.

The same type of rationale would apply to Ashcroft's immunity from being sued in his official capacity under the Eleventh Amendment. By its own language, that amendment limits the extent of federal judicial power. Allowing the case to proceed would be an exercise of judicial power whatever the result. Forcing this case through discovery and trial, even if the Eleventh Amendment defense were ultimately successful, would be destructive of the very interest served by that amendment, namely the State's fiscal autonomy and political sovereignty.

It should also be noted that petitioner elected not to pursue the alternative of requesting certification of the question pursuant to 28 U.S.C., § 1292 because there is some question as to whether a party may pursue the two

courses alternatively. Compare *Forsyth* v. *Kleindienst, supra,* and *School District of Kansas City, Missouri* v. *State of Missouri,* 592 F.2d 493 (8th Cir. 1979).

Even apart from the conflict between the circuits created by the Eighth Circuit's order dismissing the appeal, the issue of quick and effective review of the refusal to grant a government official quasi-judicial immunity is particularly necessary in these days of increased use of civil rights actions against officials who make decisions on whether to initiate and maintain both civil and criminal enforcement proceedings. The experience of this particular office is that civil rights damage actions are being filed in increasing numbers as an attempt to intimidate and harass officials whose duty it is to initiate judicial and administrative regulatory proceedings. The result is extremely disruptive in both time and expense to the official and his office. Mistaken refusals to grant dismissals at the district court level, especially when given without reason, should be reviewable by the Court of Appeals before trial.

It also should be noted that the claim of immunity was not frivolous. As a reading of the complaint in the appendix of this petition will show, the request for damages arose directly from Ashcroft's initiation and maintenance of the lawsuit. Damages are not being claimed from anything that happened to NOW before the lawsuit was filed but rather from what resulted from the lawsuit itself. These official acts have been recognized universally by the federal courts of this country to fall within the scope of the doctrine of absolute quasi-judicial immunity. *Butz* v. *Economou, supra, Imbler* v. *Pachtman, supra, Dellums* v. *Powell, supra* at page 9 *Ledwith* v. *Douglas,* 568 F.2d 117, 119 (8th Cir. 1978); *Safeguard Mutual Insurance Company* v. *Miller,* 456 F.Supp. 682, 688-693 (E.D.Pa. 1978); *Sykes* v.

State of California, (Dept. of Motor Vehicles) 497 F.2d 197, 200-201 (9th Cir. 1974), are just a few of the cases in this area.

CONCLUSION

WHEREFORE, petitioner requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit and review the issue of the appealability of the order of the district court denying petitioner's motion to dismiss.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

National Organization for Women, Inc.,

Plaintiff,

v.

John Ashcroft,

Defendant.

No. 81-1955

Appeal from the United States District Court for the Western District of Missouri

Filed: October 13, 1981

Before ROSS, Circuit Judge, GIBSON, Senior Circuit Judge, and STEPHENSON, Circuit Judge.

ORDER

On June 29, 1981, defendant moved to dismiss plaintiff's complaint. The district court denied defendant's motion on August 4, 1981. Defendant now appeals that district court order.

The appealed order was not final within the meaning of 28 U.S.C. § 1291. The district court did not direct entry of a final judgment pursuant to Fed. R. Civ. P. 54(b); nor did it designate the order as an appealable order pursuant to 28 U.S.C. § 1292(b). This is not an appealable interlocutory order under 28 U.S.C. § 1292(a). The appeal is therefore dismissed.

So ordered.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published.]

B.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., *Plaintiff,* vs. JOHN ASHCROFT, *Defendant.*	No. 81-4094-CV-C-W

ORDER

It is hereby

ORDERED that defendant's motion to dismiss is denied.

SCOTT O. WRIGHT
United States District Judge

Kansas City, Missouri

Date: .....

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., 425-13th Street, N.W. Washington, D.C. *Plaintiff,* v. JOHN ASHCROFT, Office of the Attorney General Supreme Court Building High Street Jefferson City, Missouri *Defendant.*	**No. 81 4094 CV-C-W**

COMPLAINT FOR CIVIL RIGHTS VIOLATIONS

Plaintiff National Organization for Women, Inc., for its complaint herein, alleges as follows:

1. This complaint arises under the First and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1983 and 1985.

2. This Court has jurisdiction over this complaint pursuant to 28 U.S.C. §§ 1331, 1332, and 1343. The parties are of diverse citizenship, the action arises under the Constitution and Laws of the United States, and in particular the laws protecting persons from deprivation of civil and

constitutional rights, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

3. Plaintiff National Organization for Women, Inc. (hereafter "NOW") is a nonprofit, nonstock, membership corporation organized under the Laws of the District of Columbia, having its only place of business in Washington, D.C. NOW is a tax exempt organization under Section 501(c)(4) of the Internal Revenue Code. It is a civil rights organization that was formed in 1967 to bring women into full participation in the mainstream of American society. It engages in political and educational activity relating to the rights of women. It engages in no commercial or profit-making activities.

4. Defendant John Ashcroft (hereafter "Ashcroft") is, and has been at all relevant times, the duly elected Attorney General of the State of Missouri (hereafter "State"). He is sued both in his official capacity and personally.

5. Ashcroft initiates, directs and controls litigation brought in the name of the State. In that capacity, and in view of the special character of his office, Ashcroft has a special responsibility to insure that the State does not employ legal process in a manner that may intentionally or recklessly violate the political and civil rights of any individual or class of individuals. Ashcroft also has a duty not to use his office for personal, political gain.

6. In February 1978, Ashcroft, acting under color of State law, caused to be filed a complaint in the United States District Court for the Western District of Missouri initiating an action against NOW entitled *State of Missouri* v. *National Organization for Women, Inc.*, No. 78-4053-CV-C (hereafter "antitrust lawsuit"). A copy of the complaint in the antitrust lawsuit is attached hereto as Exhibit A.

7. The complaint in the antitrust lawsuit acknowledged that NOW has been engaged in a wide variety of political and educational activities designed to persuade states, including the State of Missouri, to ratify the Equal Rights Amendment to the United States Constitution (hereafter "ERA"). One such activity has been characterized as the "ERA boycott," pursuant to which NOW and numerous other organizations have resolved not to hold meetings or conventions in states that have not yet ratified the ERA. The complaint in the antitrust lawsuit acknowledged that the ultimate goal of the ERA boycott is to bring about ratification of the ERA.

8. (a) Ashcroft knows, and knew at the time the antitrust lawsuit was filed, that many other organizations had adopted such boycott resolutions before NOW adopted such a resolution and before NOW determined, as part of its political campaign on behalf of the ERA, to urge still other organizations to adopt such resolutions.

(b) Ashcroft knows, and knew at the time the antitrust lawsuit was filed, that organizations that have adopted such resolutions have done so unilaterally, not in exchange for any consideration flowing from NOW, and have done so because of their strong support of the ERA and of women's rights generally.

(c) Ashcroft knows, and knew at the time the antitrust lawsuit was filed, that the First and Fourteenth Amendments to the United States Constitution absolutely forbid the issuance of injunctions having as their primary purpose and effect the prohibition or diminution of political speech and advocacy.

9. Nevertheless, Ashcroft caused the State to employ legal process, by the complaint and summons in the antitrust lawsuit, to accuse NOW of engaging in a conspiracy

or combination with all of the other organizations that had adopted boycott resolutions, none of which was named as a defendant in the antitrust lawsuit, to violate the antitrust laws of the United States. Additionally, Ashcroft caused the State, by the complaint and summons in the antitrust lawsuit, to seek an injunction prohibiting NOW from continuing to advocate that other organizations, in the expression of their own political beliefs, resolve to refrain from holding meetings or conventions in states that have not yet ratified the ERA.

10. Prior to the commencement of the antirust lawsuit, members of Ashcroft's staff, at Ashcroft's direction and with his knowledge and approval, threatened several nonprofit organizations with criminal antitrust prosecution if those organizations cancelled conventions in the State in support of the ERA boycott.

11. Prior to the commencement of the antitrust lawsuit, members of Ashcroft's staff, at his direction and with his knowledge and approval, met or communicated with representatives of other states of the United States and with other persons to plan a coordinated attack on NOW by the filing of the antitrust lawsuit in Missouri and similar lawsuits in other states. Pursuant to this plan, and with Ashcroft's knowledge and approval, lawsuits substantially identical to the Missouri lawsuit were filed in Nevada (*State of Nevada* v. *NOW,* C.A. No. CV-LV-78-28, RDF (D.Nev.)) and by a private organization in Louisiana (*Action Committee for Tourism, Inc.* v. *NOW,* C.A. 78-1510-H (E.D.La.)).

12. At Ashcroft's direction and with his knowledge and approval, the State engaged in extensive discovery in the antitrust lawsuit. It demanded and received access to thousands of pages of NOW documents concerning NOW's activities in connection with the ERA boycott. The State

also attempted to obtain NOW's membership lists and other sensitive information concerning NOW's members and local chapters. NOW successfully resisted that attempt.

13. In further discovery, the State took 41 depositions throughout the country of civil rights groups and other nonprofit organizations that supported the ERA boycott. The questioning at these depositions was repetitive and aimed at harassing and intimidating the organizations involved. In view of the repetitive and nonproductive nature of the depositions, and in view of the substantial expense and inconvenience to NOW of attending such repetitive depositions throughout the country, NOW asked the State to conduct such depositions, if at all, by written questions. At Ashcroft's direction and with his knowledge and approval, the State refused NOW's request and successfully opposed NOW's motion for a protective order requiring that depositions of organizations supporting the ERA boycott be conducted by written questions.

14. The antitrust lawsuit was tried before the Honorable Elmo B. Hunter from October 30 through November 15, 1978. The State's case was presented by three lawyers working full time and a fourth lawyer working part time. It consisted mainly of deposition testimony from NOW members and from representatives of various organizations that had adopted ERA boycott resolutions or policies, NOW documents showing how the organization went about publicizing and advocating the boycott, and copies of boycott resolutions adopted by many organizations, cities and counties. The State's only live witnesses were called with respect to the issue of injury, except for two representatives of boycotting organizations who were subject to subpoena. In defense, NOW called witnesses and offered deposition testimony on behalf of 34 organizations, cities and counties to explain why they had adopted boycott

resolutions. Other witnesses were called to testify about the history of the ERA, the origins of the ERA boycott, and NOW's activities in publicizing and advocating the boycott as one of many tactics to further the campaign for ratification of the ERA. Finally, five witnesses, including three political scientists, testified without contradiction about the history of political, social, and economic boycotts and the integral and important role played by boycotts in the American political system.

15. On February 21, 1979, Judge Hunter issued an Opinion and Order denying the State's request for injunctive relief and entering judgment for NOW. This decision appears at 467 F.Supp. 289. Judge Hunter found, *inter alia,* that application of the Sherman Act to NOW's advocacy of the ERA boycott, as demanded by the State, "would involve serious questions concerning the right of petition and the freedom of association protected by the first amendment."

16. At Ashcroft's direction, the State appealed from the judgment entered in NOW's favor. On March 28, 1980, the United States Court of Appeals for the Eighth Circuit affirmed the judgment. The Eighth Circuit's decision appears at 620 F.2d 1301.

17. At Ashcroft's direction, the State petitioned the Supreme Court for a writ of certiorari to reverse the Eighth Circuit's decision. The Supreme Court denied the petition on October 6, 1980.

18. During the pendency of the State's appeal to the Eighth Circuit in the antitrust lawsuit the private plaintiff in Louisiana voluntarily dismissed its complaint against NOW.

19. After the Supreme Court denied the State's petition for certiorari in the antitrust lawsuit, NOW moved

to dismiss the Nevada complaint on the basis of the decision in the antitrust lawsuit. On April 2, 1981, the district court granted NOW's motion over the plaintiff's opposition and dismissed the complaint.

20. By the commencement and maintenance of the antitrust lawsuit, Ashcroft intentionally or recklessly subjected NOW to the expense and other burdens of litigation with the knowledge and purpose that NOW was required to divert its limited resources from its primary political and educational mission to the defense of that lawsuit and similar lawsuits instigated and encouraged by Ashcroft. The antitrust lawsuit was commenced and maintained with the intent of depriving NOW of liberties, rights, privileges and immunities secured to it by the First and Fourteenth Amendments to the United States Constitution.

21. By the commencement and maintenance of the antitrust lawsuit, Ashcroft intended to and did chill the exercise of First Amendment rights by NOW and other political and educational organizations in support of the ERA. The filing and maintenance of the antitrust lawsuit had a chilling effect on such organizations' exercise of their First Amendment rights. Additionally, by the filing and maintenance of the antitrust lawsuit, Ashcroft intended to injure, and has injured, the entire women's rights movement by invoking the power, prestige and credibility of the sovereign State of Missouri in support of the spurious claim that participants in the ERA boycott are violating a Federal criminal statute and are subject to claims for damages totalling many millions of dollars. As a direct result of the antitrust lawsuit, the campaign for ratification of the ERA has been hampered.

22. Additionally, Ashcroft conspired with other states of the United States and with other persons to institute the antitrust lawsuit and similar lawsuits in other states with

the intent and purpose of harassing NOW by requiring it to defend not only the antitrust lawsuit but also similar lawsuits in other states.

23. Ashcroft engaged in the activity alleged above because of his personal disagreement with the ERA and with the other principles that NOW advocates in the exercise of its First Amendment rights, and with the intent and purpose of injuring the women's rights movement and preventing ratification of the ERA. Ashcroft additionally engaged in the activity alleged above, thereby abusing his office as Attorney General of the State, to further his own personal, political interests.

24. Such action by Ashcroft violated 42 U.S.C.§§ 1983 and 1985 and, as a direct and foreseeable consequence thereof, caused NOW to suffer damages in substantial amounts, as Ashcroft intended, (a) by the need to expand funds and use other resources to defend the antitrust lawsuit and similar lawsuits in other states, (b) by loss of actual and potential membership, (c) by the need to expend funds and use other resources to counteract adverse publicity about the legality of NOW's tactics in support of the ERA, and (d) by the need to expend additional funds and use other resources in support of the ERA that would not have been necessary if the antitrust lawsuit and the other similar lawsuits had not been filed and maintained. Such action by Ashcroft caused similar damages, as Ashcroft also intended, to the women's rights movement generally, and to other organizations that support the ERA.

WHEREFORE, plaintiff NOW prays that the Court enter judgment on its complaint:

(1) declaring that the foregoing activity by Ashcroft is in violation of the law and of the Constitutional rights of NOW;

(2) awarding NOW damages in the amount of two and one-half million dollars ($2,500,000);

(3) awarding NOW punitive damages in the amount of seven and one-half million dollars ($7,500,000); and

(4) awarding NOW the costs of this action, including reasonable attorneys' fees.

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Opposition

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No. 81-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN ASHCROFT
Attorney General of Missouri,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where an elected political official, the Attorney General of Missouri, is charged in a civil rights action with initiating and maintaining in bad faith an antitrust suit against a civil rights organization and conspiring with officials and private persons to bring similar suits against the organization in other states, is the denial of his motion to dismiss on grounds of absolute immunity appealable as a matter of right pursuant to 28 U.S.C. § 1291?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1134

JOHN ASHCROFT
Attorney General of Missouri,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This petition arises out of an action brought pursuant to 42 U.S.C. §§ 1983 and 1985 by the National Organization for Women, Inc. ("NOW"), a nonprofit civil rights organization, against John Ashcroft ("Ashcroft"), the Attorney General of Missouri. As part of its civil rights activities on behalf of women, since 1977 NOW has publicized and advocated the "ERA Boycott," the term given to describe the actions of hundreds of noncommercial organizations that have refused to hold conventions or meetings in states such as Missouri that have not yet ratified the Equal Rights Amendment to the United States Constitution. In 1978, Ashcroft filed a complaint on behalf of the State of Missouri, suing as *parens*

patriae, alleging that NOW was engaged in a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act and a comparable provision of the Missouri state antitrust laws, and that NOW's advocacy of the ERA Boycott represented an intentional infliction of harm to the economy of Missouri without legal justification. The complaint sought a broad injunction prohibiting NOW from continuing to publicize or advocate the ERA Boycott. *Missouri* v. *National Organization for Women, Inc.*, C.A. No. 78-4053 CV-C (W.D.Mo.) (hereinafter "Missouri antitrust suit").

Two days after the Missouri antitrust suit was filed, the State of Nevada filed a complaint against NOW that repeated verbatim the jurisdictional and Sherman Act allegations of Missouri's complaint. *Nevada* v. *National Organization for Women, Inc.*, C.A. No. CV-LV-78-28, RDF (D.Nev.). Two months later, a third lawsuit, which again copied the federal law allegations of Missouri's complaint, was filed against NOW by a private organization in Louisiana. *Action Committee for Tourism, Inc.* v. *National Organization for Women, Inc.*, C.A. No. 78-1510-H (E.D.La.). The private organization acted after Louisiana's Attorney General refused to sue NOW, based on his conclusion that the ERA Boycott was a political activity not subject to the Sherman Act and that a suit to enjoin NOW from advocating the boycott would violate its First Amendment rights of freedom of expression and assembly.

After full discovery and a trial, Missouri's case was dismissed and judgment entered for NOW. *Missouri* v. *National Organization for Women, Inc.*, 467 F.Supp 289, 306 (W.D.Mo. 1979). The judgment was affirmed by the Court of Appeals for the Eighth Circuit, 620 F.2d 1301 (1980), and this Court denied Missouri's petition for a writ of certiorari, 449 U.S. 842 (1980). The Nevada district court then granted NOW's motion to dismiss Nevada's suit on the basis of the decision in the Missouri

antitrust suit. *Nevada* v. *NOW*, *supra* (Apr. 1, 1981). The Louisiana suit previously had been dismissed by stipulation of the parties.

NOW commenced the current action on May 7, 1981. The complaint charges that the essential allegations of the complaint in the Missouri antitrust suit—that NOW was engaged in an illegal secondary boycott resulting in substantial and irreparable harm to the State—were demonstrably false and that Ashcroft knew them to be false when the suit was filed. NOW also alleges that Ashcroft knew that NOW's ERA Boycott activities challenged in the Missouri antitrust suit are purely political in nature and thus enjoy the protection of the First Amendment. (Appendix to Petition ("A") 7)

The complaint further alleges that Ashcroft conspired with the Attorney General of Nevada and with private parties in Louisiana to have them bring two other identical actions in two other district courts (and in two other circuits) to harass NOW by making it defend the same lawsuit more than once. In addition, NOW alleges that Ashcroft met or communicated with officials and private parties in other states to urge that still more antitrust actions be filed against NOW. (A8)

NOW alleges that the Missouri antitrust suit and the carbon copy suits in the two other states were brought as a deliberate effort to injure not only NOW but also the entire women's rights movement. NOW claims that Ashcroft acted beyond his authority and solely to advance his own personal political career. NOW alleges that these activities by Ashcroft violate 42 U.S.C. §§ 1983 and 1985. The complaint seeks both compensatory and punitive damages. (A11, 12, 13)

Ashcroft moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the Eleventh Amendment and the doctrine of "quasi-judicial" or

"prosecutorial" immunity precluded any action against him arising out of his initiation and maintenance of the Missouri antitrust suit. In opposition to the motion, NOW explained that the Eleventh Amendment does not immunize state officials from damage suits under 42 U.S.C. § 1983. NOW further contended that the narrowly limited doctrine of prosecutorial immunity, as defined by this Court, did not apply to Ashcroft for two independent reasons. First, such absolute immunity applies only to those activities that are both within the prosecutor's authority and an integral part of the judicial process. *Imbler* v. *Pachtman*, 424 U.S. 409, 430-31 and n.33 (1976). As State Attorney General, Ashcroft is not merely a prosecutor, but an elected political official, with executive as well as prosecutorial functions and responsibilities, and NOW's allegations are directed at Ashcroft's independent decision in his executive capacity to utilize the resources of the state to attack NOW and inflict injury on a civil rights movement.[1] Second, NOW pointed out that the doctrine of prosecutorial immunity could not in any event apply to Ashcroft's alleged participation in a conspiracy to bring baseless lawsuits against NOW in jurisdictions where Ashcroft himself has no authority to proceed.

NOW noted in support of its opposition that it had filed a similar civil rights claim against the Attorney

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[1] In Missouri, the Attorney General is an elected official vested with both common law and statutory authority to institute at his own initiative lawsuits on behalf of the State. Mo.Rev.Stat. §§ 27.010 (1980), 27.060 (1939); State ex rel. Taylor v. Wade, 360 Mo. 895, 231 S.W.2d 179 (1950). By contrast, in some states the attorney general can bring suit only within specific statutorily defined circumstances or at the direction of the governor. *See, e.g.*, Arizona State Land Department v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960). Thus, where the Missouri Attorney General commences a case on his own initiative, rather than at the behest of another State official or as the result of an investigation of a subordinate division or agency, he is acting in a capacity similar to that of Governor or other State executive official.

General of Nevada—who is now Nevada's Governor—and that the Governor's motion to dismiss that claim on immunity grounds had previously been denied by the Nevada district court. *Nevada* v. *NOW*, *supra* (Oct. 26, 1978). That court also had turned down the Governor's motion to certify the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Nevada* v. *NOW*, *supra* (Jan. 24, 1979). The Governor did not attempt to take an appeal from the order pursuant to 28 U.S.C. § 1291.

The district court below denied Ashcroft's motion but wrote no opinion. (A3) Unlike the Governor of Nevada, Ashcroft did not seek certification of the district court's decision pursuant to 28 U.S.C. § 1292(b), but instead filed a notice of appeal pursuant to 28 U.S.C. § 1291. The court of appeals, in a brief *per curiam* order, concluded that the order appealed from "was not final within the meaning of 28 U.S.C. § 1291" and granted NOW's motion to dismiss the appeal. (A2)

ARGUMENT

Ashcroft asks this Court to review, on the barest of records, the *per curiam* dismissal of his attempt to appeal from the denial of his motion to dismiss—the latter of which is a conventional example of a nonfinal decision. *Catlin* v. *United States*, 324 U.S. 229, 236 (1945). Ashcroft asserts that review is necessary primarily to resolve what he claims is a "conflict" between the decision below and decisions of the Courts of Appeals for the District of Columbia and Third Circuits. No such conflict exists, however; the dismissal of Ashcroft's appeal was an unexceptional application of general rules to a particular set of facts. Further review of the court's limited decision is neither necessary nor appropriate.

The court of appeals' decision involved two doctrines developed by this Court: the "collateral order" doctrine, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541

(1949), and the doctrine of absolute quasi-judicial or prosecutorial immunity, *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). These judicial doctrines share two basic attributes.

First, both are narrowly circumscribed, because they run counter to important policies. The collateral order doctrine is a narrow, strictly construed exception to the policy against piecemeal appeals and the policy favoring judicial economy. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373-74 (1981); *In re Corrugated Container Antitrust Litigation*, 611 F.2d 86, 89 (5th Cir. 1980). Absolute prosecutorial immunity undermines the fundamental principle of jurisprudence that all individuals, whatever their positions, are subject to the Constitution and the federal laws. *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); *Tigue* v. *Swaim*, 585 F.2d 909, 913 (8th Cir. 1978).

The second and related attribute is that the application of both doctrines depends less on any categorical rules than on the specific circumstances of each case. *Butz* v. *Economou*, *supra*, at 508-17 (application of absolute immunity depends upon the particular functions of the official whose actions are challenged); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) ("[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future").

Thus, the fact that courts of appeals have permitted immediate appeals from orders concerning absolute immunity claims in some cases but not in others is not evidence of a "conflict," but rather is simply the result of the courts' careful application of the finality and immunity doctrines to different sets of circumstances. In *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 101 S.Ct. 3147 (1981), for example, the Third Circuit was faced with the question, previously unsettled in that circuit, of the appropriate immunity to be

accorded a prosecutor acting in an administrative or investigative, as opposed to an advocatory, capacity. *Id.* at 1214. The Third Circuit concluded "that where the activities of the Attorney General [of the United States] depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available." *Id.* at 1214-15. Having settled that important and controlling question, the court then remanded for the district court to determine, based on all the circumstances, whether the Attorney General's actions were of a quasi-judicial or of an administrative or investigative nature. *Id.* at 1215-16. That legal issue has now been settled; future nonfinal district court orders on the issue will turn on the factual questions identified in *Forsyth*, and thus presumably will not be appealable under the collateral order doctrine.

Ashcroft's motion and the similar motion filed by the Nevada Attorney General resulted in just such orders. Both were determined in the context of NOW's factual allegations—which were necessarily accepted as true for purposes of the motions to dismiss—that the respective attorneys general were acting in their political and executive capacities and that they were conspiring with officials and private persons to bring suits in jurisdictions in which they had no authority to act. The district courts' denials of the motions therefore involved both the now-settled legal issue that absolute immunity cannot be invoked to shield purely political or executive functions merely because the defendant official also has prosecutorial functions, and the fact that even on the most generous reading of prosecutorial immunity, that doctrine does not apply to the alleged conspiracy to bring lawsuits in other states. These circumstances make it apparent that the denial of Ashcroft's motion to dismiss could not satisfy the prerequisites of the collateral order doctrine.

The absence of a conflict between the decision below and decisions of other courts of appeals is further demonstrated by absolute immunity decisions of the District of Columbia Circuit. In the decisions cited by Ashcroft, the court permitted immediate appeals to resolve serious and then-unsettled questions regarding the basic nature of the Speech and Debate clause and prosecutorial immunity. *McSurely* v. *McClellan*, 521 F.2d 1024 (D.C. Cir. 1975), *en banc*, 553 F.2d 1277 (1976), *cert. dismissed sub nom. McAdams* v. *McSurely*, 438 U.S. 189 (1978); *Dellums* v. *Powell*, No. 80-1331 (D.C. Cir. July 24, 1981). On another set of facts, however, the court of appeals dismissed for lack of finality an appeal from the denial of a motion to dismiss based on a claim of absolute immunity. *Fitzgerald* v. *Butterfield*, Nos. 80-1406 *et al.* (D.C. Cir. Apr. 30, 1980), *cert. granted sub nom. Nixon* v. *Fitzgerald*, 101 S.Ct. 3106 (1981).

The court of appeals' decision below is no more inconsistent with the cases cited by Ashcroft than the above decisions of the District of Columbia Circuit are with each other. Ashcroft's attempt to have this Court state a blanket rule permitting immediate appeals under the collateral order doctrine from all orders denying claims of absolute prosecutorial immunity is therefore unwarranted and does not deserve the Court's plenary consideration.

Nor *does* this case present issues of sufficient importance or impact to justify review. As far as we are aware, prior to the Missouri antitrust suit no state attorney general had ever attempted to use the federal antitrust laws to enjoin a civil rights boycott, and in view of the decision in that case, it is unlikely that any state attorney general will attempt to do so in the future. Moreover, it is unlikely that many public prosecutors will urge officials and private parties in other jurisdictions to file multiple carbon copy lawsuits against the same defendant, as happened in this case. In short, the

unreported decisions without opinions of the court of appeals and district court below, which were based on the unique facts of this case, are unlikely to have any effect on the application and reviewability of the absolute immunity doctrine in those Section 1983 actions against public prosecutors that are commonly brought and just as commonly dismissed.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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